12-9-2011

Parkwest Homes, LLC v. Barnson Respondent's Brief Dckt. 38919

IN THE SUPREME COURT OF THE STATE OF IDAHO

PARKWEST HOMES LLC, an Idaho limited liability company, Appellant, vs. JULIE G. BARNSON, an unmarried woman; and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation, as nominee for HOMECOMINGS FINANCIAL, LLC, aka HOMECOMINGS FINANCIAL NETWORK, INC., Defendants. and RESIDENTIAL FUNDING REAL ESTATE HOLDINGS, LLC, a Delaware limited liability company, Intervenor-Respondent.	Supreme Court Case No. 38919-2011 District Court Case No. CV 07-8274

RESPONDENT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT FOR CANYON COUNTY, HONORABLE BRADLEY S. FORD, DISTRICT JUDGE, PRESIDING

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Residential Funding Real Estate Holdings, LLC ("Residential"), Intervenor-Respondent in the above-captioned appeal, by and through its attorneys of record, Hawley Troxell Ennis & Hawley LLP, respectfully submits this Respondent's Brief in opposition to Appellant's Brief filed by ParkWest Homes LLC ("ParkWest").

I. STATEMENT OF THE CASE

A. Nature of the Case

The current dispute between ParkWest and Residential has its origins in an action to foreclose a mechanic's lien (the "Lien") brought more than five years ago by ParkWest against Mortgage Electronic Registration Systems, Inc. ("MERS"), then the beneficiary of a now-foreclosed deed of trust (the "Deed of Trust") recorded against real property in Canyon County (the "Property"). ParkWest never commenced an action against First American Title Insurance Company ("First American"), the former trustee of the Deed of Trust. MERS obtained summary judgment from the District Court under Idaho Code sections 45-507 and 54-5201, *et seq.* ParkWest then appealed, and in *ParkWest Homes LLC v. Barnson*, 149 Idaho 603, 238 P.3d 203 (2010) ("*ParkWest I*"), this Court reversed the District Court's grant of summary judgment in favor of MERS, holding that (i) ParkWest substantially complied with the "just credits and offsets" demand and verification requirements of Idaho Code section 45-507 and (ii) ParkWest did not lose its lien rights under the Idaho Contractor Registration Act. R., Vol. I, pp. 83–92.

Following remand of the action to the District Court, Residential, who had purchased the Property from First American at the trustee's sale of the Property, intervened and brought a Motion for Summary Judgment, successfully arguing below that ParkWest's Lien was void as

against Residential under Idaho Code section 45-510 because ParkWest failed to commence an action against First American—Residential's predecessor in interest—within six months of the filing of ParkWest's Lien. Because (i) Idaho Code title 45, chapter 15 vests legal title in property subject to a deed of trust in the trustee, and (ii) under Idaho Code section 45-510, a mechanic's lien expires if an action is not timely commenced against a person having an interest in property subject to the mechanic's lien, the District Court correctly granted Residential summary judgment as against ParkWest. This Court should affirm the District Court's decision.

B. Statement of Facts

1. In 2004, Julie G. Barnson ("Barnson") and David Zawadzki ("Zawadzki") created a business plan to build and sell residential homes to the public. R., First Appeal ("FA"), p. 44.

2. Zawadzki and Barnson's business plan required them to obtain financing to purchase and construct the residential homes. To obtain financing, on March 15, 2006, ParkWest and Barnson submitted an illegal construction "contract" to Black Hawke Construction Lending, L.L.C. ("Black Hawke"). Black Hawke, then, based in part on the sham contract, extended a construction loan to Barnson by which Barnson purchased the Property and Zawadzki, under the name ParkWest Homes, LLC, commenced construction on the residence. R., FA, p. 45.

3. On November 14, 2006, Barnson obtained two loans from Homecomings Financial to repay Black Hawke. In exchange for the Homecomings Financial loans, Barnson

caused two Deeds of Trust to be recorded as Instrument Nos. 200690998[1] and 200690999, official records of Canyon County, Idaho. R., FA, p. 96; R., Vol. I, p. 84; R., Vol. III, pp. 367–89; *ParkWest Homes I*, 149 Idaho at 206, 238 P.3d at 205. As set forth on the face of the Deed of Trust, MERS was named the "Beneficiary," and Transnation Title ("Transnation") was named the "Trustee" of the Deed of Trust. R., Vol. III, pp. 367–89.

4. On November 28, 2006, ParkWest filed its Lien as Instrument No. 200694511, Official Records of Canyon County, Idaho, against the Property, asserting a right to payment in the amount of $189,117.99. R., Vol. I, pp. 103–04.

5. On June 28, 2007, First American was appointed the successor Trustee of the Deed of Trust. R., Vol. III, p. 390.

6. ParkWest filed its Verified Complaint to foreclose its Lien on August 7, 2007, commencing the above-captioned lawsuit. R., FA, pp. 4–16. However, ParkWest named only Barnson (as Borrower) and MERS (as Beneficiary) as party-defendants, completely neglecting to commence the foreclosure action as against Transnation, the original Trustee under the Deed of Trust, or First American, the successor Trustee under the Deed of Trust. R., FA, pp. 4–16.

7. On September 30, 2008, ParkWest and Barnson filed a Stipulation for Entry of Default Judgment (the "Barnson Stipulation"), which permitted ParkWest to take "immediate possession of the Property," and in exchange, ParkWest agreed to "waive and release[] Barnson from any personal liability related to or arising out of ParkWest's improvement of the Property."

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[1] This is the "Deed of Trust" which was foreclosed and pursuant to which the Trustee's Sale was held and the Property conveyed by First American to Residential.

R., Vol. I, pp. 8–11. Significantly, neither MERS nor First American was a party to the Barnson Stipulation. R., Vol. I, pp. 8–11.

8. On October 7, 2008, pursuant to the terms of the Barnson Stipulation, the District Court entered a default judgment against Barnson only (the "Barnson Judgment"). R., Vol. IV, pp. 548–52. The Barnson Judgment was recorded in the Official Records of Canyon County, Idaho, on October 9, 2008 (the "Barnson Judgment Lien"). R., Vol. IV, pp. 548–52.

9. On July 20, 2009, based on Barnson's default, the Deed of Trust was foreclosed, and First American conveyed the Property to Residential via Trustee's Deed (the "Trustee's Deed"), following a trustee's sale (the "Trustee's Sale"). R., Vol. III, pp. 391–92.

C. Course of the Proceedings Below

1. ParkWest commenced the above-captioned lawsuit, against Barnson and MERS only, on August 7, 2007. R., FA, pp. 4–16.

2. The Barnson Stipulation was filed on September 30, 2008. R., Vol. I, pp. 8–11.

3. On October 2, 2008, MERS filed a motion for summary judgment, contending that that ParkWest's mechanic's lien was void because (a) the claim of lien did not substantially comply with Idaho Code section 45-507; (b) ParkWest was not registered under Idaho's Contract Registration Act, when it entered into the construction contract with Barnson; and (c) prior to contracting with Barnson ParkWest had failed to provide her with the disclosures required by Idaho Code section 45-525. *ParkWest I*, 149 Idaho at 605, 238 P.3d at 205.

4. On October 6, 2008, ParkWest filed the Second Amended Complaint to Foreclose Lien, R., FA, pp. 95–105.

5. The District Court entered the Barnson Judgment on October 7, 2008, and two days later it was recorded in the Official Records of Canyon County. R., Vol. IV, pp. 548–52.

6. The District Court granted MERS' Motion for Summary Judgment, and entered judgment in favor of MERS on January 26, 2009. R., FA, pp. 115–33, 134-36.

7. On March 9, 2009, ParkWest appealed the District Court's decision to the Idaho Supreme Court. R., FA, pp. 137–40.

8. In a decision dated June 25, 2010, this Court overturned the District Court's entry of judgment in favor of MERS, holding that (i) ParkWest substantially complied with the "just credits and offsets" demand and the verification requirement under Idaho Code section 45-507 and (ii) ParkWest did not lose its lien rights under the Idaho Contractor Registration Act. *ParkWest I*, 149 Idaho 603, 238 P.3d 203. The Supreme Court then remanded the case to the District Court for further proceedings consistent with its opinion. R., Vol. I, p. 93.

9. Following remand, on September 14, 2010, ParkWest filed its Supplemental Amended Complaint to Foreclose Lien, for a third time naming only Barnson and MERS, and neglecting to name Transnation, First American, or Residential—the entity that had purchased the Property at a trustee's sale on July 29, 2009, more than a year before. R., Vol. I, p. 94–105.

10. MERS filed its answer to the Supplemental Amended Complaint to Foreclose Lien on October 7, 2010. R., Vol. I, pp. 106–13.

11. On November 10, 2010, the District Court entered its Order On Stipulation To Intervene, permitting Residential to intervene in this action. R., Vol. I, pp. 164-166.

12. On November 12, 2010, MERS filed a motion to be dismissed from the litigation, arguing that its interest in the Property was extinguished following the Trustee's Sale to Residential on July 29, 2009. R., Vol. IV, pp. 487–89. The District Court agreed and granted MERS' dismissal from the action. ParkWest has not appealed that dismissal. R., Vol. IV, pp. 487–89; R., Vol. IV, pp. 600–05.

13. On November 15, 2010, Residential filed its Answer and Counterclaim in Intervention. R., Vol. II, pp. 299–341.

14. On November 17, 2010, Residential filed its motion for summary judgment, arguing that ParkWest's Lien was void as against Residential for ParkWest's failure to commence an action against First American, Residential's predecessor in interest, within six months of the filing of the Lien, as required by Idaho Code section 45-510. R., Vol. III, pp. 346–62. First American, as Trustee of the Deed of Trust, held the power of sale to the Property, and exercised that power of sale pursuant to the Trustee's Sale held July 20, 2009, ParkWest's failure to commence an action against First American permitted Residential to take title to the Property free and clear of ParkWest's Lien. R., Vol. III, pp. 346–62.

15. On February 16, 2011, the District Court issued its Memorandum Decision and Order granting Residential's motion for summary judgment. R., Vol. IV, pp. 481–503.

16. On February 23, 2011, ParkWest filed a motion for reconsideration of the District Court's decision. R., Vol. IV, pp. 516–26.

17. On March 1, 2011, the District Court entered judgment in favor of Residential. R., Vol. IV, pp. 481–503.

18. On March 3, 2011, ParkWest filed a Motion to Alter or Amend Judgment. R., Vol. IV, pp. 511–15.

19. On June 14, 2011, the District Court issued its Memorandum Decision And Order Denying Parkwest's Motion For Reconsideration – And Motion To Alter Or Amend Judgment. R., Vol. IV, pp. 585–99.

20. On June 21, 2011, ParkWest filed a Notice of Appeal. R., Vol. IV, pp. 600–05.

II. ISSUES PRESENTED ON APPEAL

Residential asserts that the issues on appeal should be stated as follows:

A. Was the District Court correct in concluding that, under Idaho Code section 45-510, ParkWest's failure to name First American as a party defendant means that Residential took title to the Property free and clear of ParkWest's Lien?

B. Was the District Court correct in concluding that ParkWest's recorded lis pendens do not prevent entry of Judgment in favor of Residential?

C. Was the District Court correct in concluding that Residential's challenge to ParkWest's Lien was not barred by the "law of the case" doctrine?

C. Is Residential entitled to attorneys' fees incurred on appeal, pursuant to Idaho Code section 12-121 and Idaho Appellate Rule 41, because ParkWest cannot show that the District Court misapplied the law in granting summary judgment in favor of Residential?

III. ARGUMENT

A. Standard Of Review

When the Idaho Supreme Court "reviews a district court's grant of summary judgment, it uses the same standard properly employed by the district court originally ruling on the motion." *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 87, 996 P.2d 303, 306 (2000). Under that standard, summary judgment "shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). The moving party has the burden of establishing the lack of a genuine issue of material fact. *Orthman v. Idaho Power Co.*, 130 Idaho 597, 600, 944 P.2d 1360, 1363 (1997). To meet this burden, the moving party must challenge in its motion and establish through evidence that no issue of material fact exists for an element of the nonmoving party's case. *Smith v. Meridian Joint Sch. Dist. No. 2*, 128 Idaho 714, 719, 918 P.2d 583, 588 (1996). The nonmoving party "may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." I.R.C.P. 56(e).

The nonmoving party must submit more than just conclusory assertions that an issue of material fact exists to establish a genuine issue. *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 401, 987 P.2d 300, 313 (1999). "[A] mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of material fact for purposes of summary judgment." *Samuel*, 134 P.2d at 87, 996 P.2d at 306.

In its appeal, ParkWest has not alleged any issue of material fact. ParkWest has not denied that First American was the Trustee of the Deed of Trust at the time that ParkWest commenced an action to foreclose its Lien, and ParkWest admits that it never commenced an action against either First American or Transnation (the predecessor to First American). ParkWest has made no effort to cite to, much less litigate the effect of, Idaho Code section 45-510 in this appeal. By ignoring that statute and raising other issues, ParkWest has failed to so much as identify the only real issue on appeal. The other issues ParkWest attempts to raise instead are red herrings, irrelevant to this case and appeal. For the reasons set forth herein, the District Court's rulings of law on the undisputed facts were correct and should be affirmed.

B. The District Court Correctly Concluded That Residential Took Title To The Property Free And Clear Of ParkWest's Lien.

1. ParkWest's failure to commence proceedings against the trustee of the Deed of Trust voids ParkWest's Lien as to Residential.

Idaho Code section 45-510 provides that:

> No lien provided for in this chapter binds any building, mining claim, improvement or structure for a longer period than six (6) months after the claim has been filed, unless proceedings be commenced in a proper court within that time to enforce such lien . . . .

IDAHO CODE ANN. § 45-510. Thus, if a lien claimant does not commence an action against an interested party within six months, the lien is void as to the unnamed party. In *Palmer v. Bradford*, this Court held that Idaho Code section 45-510:

> creates and limits the duration of the lien. The statute also gives jurisdiction to the court to foreclose or enforce a lien on certain conditions—the filing of a claim of lien, and the commencement of the action within the time specified after such claim is filed. If these things are not done ***no jurisdiction exists in the court to enforce the lien. When the***

> ***limit fixed by statute for duration of the lien is past, no lien exists, any more than if it had never been created.***

86 Idaho 395, 401, 388 P.2d 96 (1963) (internal citations omitted) (emphasis added). *See also Western Loan & Bldg. Co. v. Gem State Lumber Co.*, 32 Idaho 497, 501, 185 P. 554 (1919) (holding that a lien was void as against mortgagee when the suit was not timely filed); *D.W. Standrod & Co. v. Utah Implement-Vehicle Co.*, 223 F. 517, 518 (9th Cir. 1915) (finding that the lien was void as against all subsequent encumbrancers who were not made parties to an action to foreclose the lien within six months from the date of the filing thereof); *Continental & Commercial Trust v. Pacific Coast Pipe Co.*, 222 F. 781, 788 (9th Cir. 1915) (holding that the predecessor to Idaho Code section 45-510 requires that a timely foreclosure action must be brought against all of those whose rights, estates, or interests are claimed to be adverse and subordinate, or else they could not be added); *Utah Implement-Vehicle Co. v. Bowman*, 209 F. 942, 947–48 (D. Idaho 1913) (finding that where a mortgagee of certain property was not made a party to the suit to enforce mechanic's lien within statutory period, the lien was of no effect against the mortgagee's interest).

Under this long standing and uncontroverted Idaho law, ParkWest's Lien is void as to all persons and entities who (i) claim a right in the Property, and (ii) who were not named, or whose predecessors in interest were not named, as defendants in the lien foreclosure action within six months of the filing of the Lien. Residential claims a right in the Property via its predecessor in interest, First American, who held a legal interest in the Property as Trustee of the Deed of Trust at the time ParkWest commenced this action. Neither Residential, its predecessor in interest First

American, nor First American's predecessor Transnation, were ever named as defendants in ParkWest's lien foreclosure action. ParkWest's Lien is, therefore, void as to Residential.

The Idaho Legislature has dedicated an entire Chapter of the Idaho Code to the principle that a trustee of a deed of trust holds legal title to property conveyed by a deed of trust. Specifically, Idaho Code section 45-1513 states: "A deed of trust or transfer of any interest in real property in trust to secure the performance of any obligation shall be a conveyance of real property." Idaho Code section 45-1502 states that this "conveyance" is a transfer of legal title to a trustee, not a beneficiary:

> "Trust deed" means a deed executed in conformity with this act and *conveying real property to a trustee* . . .
>
> "Trustee" means a person to whom the legal title to real property is conveyed by trust deed, or his successor in interest.

As with any other person who holds legal title to property, the consequence of failing to timely commence an action to foreclose the mechanics lien against a trustee is that the mechanic's lien expires and is thereafter void as to the trustee and all persons claiming under the trustee.

That a trustee of a deed of trust must be named as a party defendant in order to foreclose a mechanic's lien as against the lien of the deed of trust is, quite literally, hornbook law:

> In a jurisdiction in which a deed of trust or mortgage is effective as a transfer of legal title to the secured party [and Idaho is such a jurisdiction, per 45-1502 and 45-1513], the trustee of a deed of trust recorded before attachment of a mechanic's lien is a necessary party to a suit to enforce the mechanic's lien; if the trustee is not a party to the enforcement suit, the mechanic's lien cannot be enforced. Thus, the court in such a case must have jurisdiction over the person of the trustee before the court can divest the trustee of title.

53 AM. JUR. 2D *Mechanics' Liens* § 369 (2010). Under this rule, ParkWest lost any right it may have had against First American by failing to name First American as a party defendant within the six-month statutory period. As the plain language of Idaho Code sections 45-1502 and 45-1513 instruct, First American held legal title to the Property at the time ParkWest initiated this lawsuit in 2007, and held legal title until it conveyed the Property to Residential in 2009. *See also Defendant A v. Idaho State Bar*, 132 Idaho 662, 665, 978 P.2d 222, 225 (1999) ("Legal title to the property is conveyed by the deed of trust to the trustee. . . . Only *after* the obligation secured by the deed of trust is satisfied is the deed of trust *re*conveyed to the grantor.") (first emphasis added). The Court must, therefore, have jurisdiction over Residential or its predecessor in interest before it can enter a judgment foreclosing Residential's interest and ordering a judicial sale of the Property pursuant to the Lien. Absent such jurisdiction, the Court cannot enter a decree divesting Residential of title.

Courts across the country have come to the same conclusion. The Supreme Court of Virginia addressed this precise issue and concluded that because the deed of trust trustee was a necessary party in a proceeding to enforce a mechanic's lien, the failure to name such trustee defeats the enforcement suit. In *Walt Robbins, Inc. v. Damon Corp.*, 348 S.E.2d 223 (Va. 1986), the court considered whether a mechanic's lien was unenforceable because the lien claimant failed to name the deed of trust trustee as a party defendant. The court, on appeal from a chancery commissioner's report, considered and rejected the plaintiff's argument that the trustee was not a necessary party. Instead, the court concluded:

> We are of opinion that a trustee in an antecedent deed of trust recorded on unimproved land is a necessary party in a suit to enforce a mechanic's lien on the improvements. Where, as here, a mechanic's lien is to be enforced by judicial sale, title is conveyed to the successful bidder by a special commissioner appointed for that purpose. If legal title is vested in the trustee of an antecedent deed of trust, and the property is to be sold free of the trust lien, the chancellor must have jurisdiction over the person of the trustee before he can enter a decree divesting him of title.
>
> We hold, therefore, that [the] mechanics' liens were not enforceable because the trustees and the beneficiary of the deed of trust were not made parties to the suits to enforce.

Id. at 228. *See also Lunsford v. Wren*, 63 S.E. 308, 311 (W. Va. 1908) ("The trustee in a deed of trust, holding the legal title, is a necessary defendant to such suit, and his absence renders the bill fatally defective.").

Courts across the country have clarified that the rule is applied with equal force to liens that attach before the recording of the deed of trust. *See, e.g., Heyward & Lee Constr. Co., Inc. v. Sands, Anderson, Marks & Miller*, 453 S.E.2d 270, 273 (Va. 1995) ("[T]he trustee . . . of a deed of trust recorded *subsequent* to the filing of the mechanic's lien but prior to the filing of the enforcement suit were necessary parties."); *James T. Bush Constr. Co. v. Patel*, 412 S.E.2d 703, 704–05 (Va. 1992) (holding that "[t]he trustee, vested with legal title to the property, was . . . a necessary party because enforcement of the mechanic's lien through judicial sale, as sought by the mechanic's lienor, could not result in the issuance of a title free and clear of the lien unless the trustee was a party to the proceeding," and that it was immaterial that the deed of trust was recorded subsequent to the filing of the mechanic's lien).

The California Court of Appeals' decision in *Riley v. Peters,* 15 Cal. Rptr. 41 (Cal. Ct. App. 1961) provides an analogous example to the case at bar. In *Riley*, the plaintiff/respondent

("Buyer") was, just like Residential here, a purchaser of property at a trustee's sale who thereafter brought, like Residential's counterclaim here, a quiet title action against mechanic's lien claimants who had filed liens and "obtained judgments against the former owners [of] the property." *Id.* at 42. Subsequent to the mechanic's lien claimants' judgments, the trustee of a deed of trust on the property foreclosed and "the trustee executed and delivered to [Buyer] a trustee's deed." *Id.* The mechanic's lien claimants had not joined "the trustee under the deed of trust as parties to any of the actions to foreclose their mechanic's liens." *Id.* The California Court framed the issue then before the court (the precise issue now before this Court) as follows:

> The parties concede that since appellants had commenced work prior to the recording of the deed of trust, appellants' liens prevail over the deed of trust through which [Buyers] obtained their interest. The sole issue, therefore, may be thus stated: Is commencement of an action against only the owner, and not also against the trustee or the subsequent holder under a deed of trust, effective . . . to preserve the lien and to prevail over the rights of interested persons who have not been named as parties?

Id. at 297–98. The California Court concluded that:

> [as to] holders of mechanics' liens on the property, who have failed in their lien foreclosure actions to join as parties the trustee under a deed of trust or to join the subsequent owners under that deed . . . such failure precludes [such mechanics' lien claimants] from claiming priority over such owners.

Id., at 297.

For over one hundred years, courts across the United States have similarly held that a lien claimant must name the trustee under a deed of trust in order for the lien to be effective as against the trustee or successor in interest to the trustee. *See Johnson v. Bennett*, 40 P. 847, 849 (Ct. App. 1895) (citing a Colorado statute virtually identical to Idaho Code section 45-510 and

holding that "the suit must embrace all persons against whom priority of lien is claimed. . . . To establish a lien as superior to an incumbrance, the *cestui que* trust and the trustee must be made parties within six months"); *Schillinger Fire-Proof Cement & Asphalt Co. v. Arnott*, 14 N.Y.S. 326, 329 (N.Y. Spec. Term 1891) (reversing a judgment foreclosing a mechanic's lien because of the failure of the mechanic's lien claimant to name as a party defendant the "trustee under the mortgage on the premises"); *Columbia Bldg. & Loan Ass'n v. Taylor*, 25 Ill.App. 429, (1887) (holding that where the property owner "executed a trust deed . . . to one Philip Maas, as trustee, thereby conveying the legal title in said premises to him," and where the subsequent action for foreclosure brought by a mechanic's lien claimant "made the *cestui que trust*, under the trust deed, a party," the lien claimant "should also have made the trustee, in whom the legal title was vested, a party. The rule is inflexible in such a case as this, that both the trustee and *cestui que trust* should be made parties").

The principle that a court must have jurisdiction over a deed of trust trustee before it can foreclose the trustee's interest is consistent with jurisdictional principles of Idaho law. For example, in *Weyyakin Ranch Property Owners' Ass'n, Inc. v. City of Ketchum*, 127 Idaho 1, 2–3, 896 P.2d 327, 328–29 (1995), the court held that a trial court never obtained jurisdiction over elected city officials where "only the City of Ketchum was named as a party" and the plaintiffs "failed to name the elected officials individually[.]" And in *Collier Carbon & Chemical Corp. v. Castle Butte, Inc.*, 109 Idaho 708, 710, 710 P.2d 618, 620 (Ct. App. 1985), the court found that the trial court "lacked jurisdiction initially to enter such a judgment" against persons where the complaint failed to name persons in their individual capacity as defendants. Likewise here: the

failure to name First American as a party defendant deprived the District Court of jurisdiction to enter a judgment against First American, or its successor in interest, Residential.

The Court of Appeals' decision in *Bonner Building Supply, Inc. v. Standard Forest Products, Inc.*, 106 Idaho 682, 682 P.2d 635 (Ct. App. 1984) is on point. In that case, Standard Forest Products, Inc. ("Standard") purchased the property at issue via sheriff's sale. *Id.* at 684, 682 P.2d at 637. Subsequently, Bonner Building Supply, Inc. ("Bonner") recorded a mechanic's lien that otherwise would have been superior to Standard's interest. *Id.* Bonner then brought its lien foreclosure action, but "Standard was not made a party to the foreclosure action or the ensuing sale." *Id.* The Court of Appeals held:

> although Bonner was not required to name Standard as a party to the foreclosure action . . . the failure to do so left Standard's interest in the property unaffected by the foreclosure. Because Bonner failed to foreclose against Standard within six months of the filing of the claim of lien, it lost its lien against the property in regard to Standard. For the purpose of this instant case, Bonner's lien was extinguished. Standard's interest in the property should be confirmed by the district court, free of Bonner's lien.

Id. at 686, 682 P.2d at 639. A California case, also virtually identical to this one, reaches the same conclusion. In *Sawyer Nurseries v. Galardi*, 226 Cal.Rptr. 502 (Cal. Ct. App. 1986), Sawyer Nurseries "provided labor and materials to improve certain real property located in Malibu, California." *Id.* at 504. Six months later, the property owner executed a deed of trust against the property in favor of Cambridge, and then. Sawyer Nurseries recorded its mechanic's lien. *Id.* at 505 Five months later, the property owner filed bankruptcy, Cambridge obtained relief from the bankruptcy stay, foreclosed on the property, and recorded a trustee's deed conveying

title to the property. *Id.* at 506. Sawyer Nurseries then filed an action to foreclose its mechanics' lien, some eight months after the bankruptcy court granted Cambridge relief from stay. *Id.*

The California court held that the mechanic's lien foreclosure action was untimely and therefore barred: "once the automatic stay tolling [the mechanic's lien foreclosure statute] terminated, [the lien claimant] was required to act within the . . . statutory time limitation set forth therein on order to protect its mechanic's lien rights." *Id.* at 507. Notwithstanding the fact that the property owner filed bankruptcy, and notwithstanding the fact that the lien was of record at the time of the execution of the trustee's deed, Sawyer Nurseries was not absolved of its duty to commence its action to foreclose against all interested parties, and Sawyer Nurseries' failure to comply with its duties meant that Cambridge could convey the property via trustee's deed free and clear of Sawyer Nurseries' mechanic's lien.

Similarly, in this case, any lien or right of foreclosure that ParkWest may have had against First American's interest, even if otherwise valid, was lost when ParkWest failed to name First American as a party defendant within the six-month statutory period. Consequently, in this case the District Court correctly concluded that:

> First American, as the trustee, held the power of sale and the power to convey legal title in the property. ParkWest failed to name First American as a party defendant in this action or otherwise proceed against the trustee in its action and thus, ParkWest's lien is not valid as to First American pursuant to I.C. 45-510 and the authority cited above. Thus, when First American conveyed title to Residential via the Trustee's Deed, Residential took title to the property free of the lien's encumbrance. As noted in *Palmer*, the failure to commence an action pursuant to a lien within six months results in the finding that no lien existed at the time of the trustee's sale.

R., Vol. IV, p. 499.

2. ParkWest cannot show an exception to the Idaho Code section 45-510 which would permit its Lien to trump Residential's interest in the Property.

In its Appellant's Brief, ParkWest "acknowledges that its mechanic's lien was lost with respect to First American's interest in the Property." Appellant's Br. at 30. ParkWest does not, therefore, dispute that it failed to comply with Idaho Code section 45-510 with respect to First American. This concession should end the inquiry, as without jurisdiction, the District Court cannot enter a decree divesting First American, or its successor in interest, Residential, of title; however, ParkWest makes two arguments that its Lien is valid and enforceable as against Residential, which are addressed in turn.

First, ParkWest argues that *First American's interest in the Property was limited to "legal title for purposes of the power of sale."* Appellant's Br. at 31. It is difficult to discern how this argument rescues ParkWest's Lien. When Barnson executed the Deed of Trust, Transnation, and subsequently First American, held legal title to the Property for purposes of the power of sale as Trustee under the Deed of Trust. As analyzed in *Long v. Williams* 105 Idaho 585, 587, 671 P.2d 1048, 1050 (1983):

> The nature of such [a deed of trust] has been extensively discussed by this court, and the sum and substance of such discussion is that while the legal title passes thereunder, and the trustees cannot be held to hold a mere 'lien' on the property, it is practically and substantially only a mortgage with power of sale. The legal title is conveyed solely for the purpose of security, leaving in the trustor or his successors a legal estate in the property, ***as against all persons except the trustees and those lawfully claiming under them. Except as to the trustees and those holding under them***, the trustor or his successor is treated by our law as the holder of the legal title. The legal estate thus left in the trustor or his successors entitles

> them to the possession of the property ***until their rights have been fully divested by a conveyance made by the trustees in the lawful execution of their trust***, and entitles them to exercise all the ordinary incidents of ownership, in regard to the property, subject always, of course, to the execution of the trust.

(emphasis added) (quoting *Bank of Italy Nat. Trust & Savings Ass'n v. Bentley*, 20 P.2d 940, 944 (Cal. 1933)). Therefore, at the time the Deed of Trust was executed, Barnson held a legal estate in the Property that was good as to all persons except Transnation as the original Trustee under the Deed of Trust. Transnation, and then First American when it was appointed the successor trustee under the Deed of Trust, held a latent power of sale—the right to convey legal title to the Property in the events of (i) Barnson's default of the Deed of Trust, and (ii) a lawful foreclosure of the Deed of Trust. *See Willis v. Realty Country, Inc.*, 121 Idaho 312, 314, 824 P.2d 887, 889 n.2 (Ct. App. 1991) (holding that "the trustee[has] power to sell the property in the event of the grantor's default on the underlying obligation"). When Barnson defaulted on the Deed of Trust, that latent power of sale became active and First American conveyed the Property to Residential following the Trustee's Sale. Barnson's legal rights to the Property were then "fully divested by a conveyance made by the trustees in the lawful execution of their trust." *Id.* As discussed above, because ParkWest did not commence an action to foreclose First American's power of sale, the lien was void as to First American's power of sale by the time of the Trustee's Sale, and First American conveyed title to the Property, free and clear of ParkWest's Lien, to Residential. Barnson's legal rights to the Property did not somehow flow from her to First American and then to Residential: the case law makes clear that Barnson's rights were "divested" by First

American—Barnson completely lost her interest in the Property, and the Trustee had the right to convey the Property free of any interest of Barnson at the Trustee's Sale.

ParkWest argues that *Long v. Williams* compels a different result. In *Long*, Williams owned property subject to a deed of trust with Avco as beneficiary and Lewis County Abstract Company as trustee. *Id.* at 586, 671 P.2d at 1049. Williams filed for bankruptcy, and Williams' right to the property was passed to the bankruptcy trustee by operation of the bankruptcy laws. *Id.* During the administration of the estate, the bankruptcy trustee conveyed the property back to Avco, the beneficiary under the deed of trust. *Id.* However, at that point, Avco requested that the Lewis County Abstract Company reconvey the property, which it did. *Id.* Avco then quitclaimed its interest to Long. *Id.*

Williams later sued under the theory that the Lewis County Abstract Company retained legal title to the property by virtue of the original deed of trust, that the property never entered the bankruptcy estate and, therefore, there was nothing for the bankruptcy trustee to convey to Avco by sale. *Id.* at 587, 671 P.2d at 1050. Thus, Williams argued, when Avco had Lewis County Abstract Company reconvey the property to Williams, Williams received both legal and equitable title and extinguished Avco's interest. *Id.*

The Supreme Court rejected Williams' argument, holding that:

> At the time Williams filed his petition in bankruptcy . . . Lewis County Abstract Company held nothing more than the power of sale upon the happening of certain contingencies. . . .
>
> The trustee in bankruptcy conveyed all legal and equitable interests of Williams in the subject property to Avco. Avco's interest as beneficiary under the Deed of Trust merged with this purchased interest.

Id. at 588, 671 P.2d at 1051. Thus, the bankruptcy trustee conveyed to Avco everything that Williams had—which was a legal estate in the property good as against all persons except the trustee, Lewis County Abstract Company. *Id.* Up to that point, Lewis County Abstract Company had, like Transnation and First American here, legal title and a latent power of sale which could only be exercised upon the happening of certain contingencies. Unlike First American here, that latent power never became active because Avco obtained the grantor's interest before Lewis County Abstract Company could exercise the power of sale. *Id.* Therefore, "when Lewis County Abstract executed the Deed of Reconveyance, it conveyed no interest." *Id.*

In comparison, the case at bar involves the situation in which Barnson's rights were "fully divested by a conveyance made by the trustees in lawful execution of their trust," following Barnson's default and the foreclosure of the Deed of Trust. *Id.* As the District Court recognized, "the facts of *Long* are [not] commensurate with the facts of this case." R., Vol. IV, p. 595. Barnson defaulted on the Deed of Trust, the Deed of Trust was foreclosed, First American's latent power of sale was activated, and First American's legal interest was not burdened by ParkWest's Lien, which, under Idaho Code section 45-510, was void as to First American.

Second, ParkWest argues that *because ParkWest's Lien attached to the Property effective prior to when Barnson granted the Deed of Trust, and because under Idaho Code section 45-1506 (10) Barnson could convey to the trustee no more than Barnson's encumbered interest, the trustee received and could convey to Residential no more than the encumbered interest.* Appellant's Br. at 33–34. This argument, however, reads Idaho Code section 45-510 out of existence. Even if this Court were to accept ParkWest's argument that "the Trustee's Deed could

convey to Residential no more than Barnson's encumbered interest in the Property," that statement cannot nullify ParkWest's 45-510 requirement to commence an action against all persons with an interest in the Property. As held in *Bradbury v. Idaho Judicial Council*, 149 Idaho 107, 116, 233 P.3d 38, 47 (2009)

> When interpreting the meaning of the language contained in a statute, this Court's task is to give effect to the legislature's intent and purpose. In construing a statute, the Supreme Court may examine the language used, reasonableness of the proposed interpretations, and the policy behind the statutes. It is incumbent upon this Court to interpret a statute in a manner that will not nullify it, and it is not to be presumed that the legislature performed an idle act of enacting a superfluous statute. The Supreme Court will not construe a statute in a way which makes mere surplusage of provisions included therein.

(quoting *Sweitzer v. Dean*, 118 Idaho 568, 571–72, 798 P.2d 27, 30–31 (1990)). Idaho Code sections 45-1506(10) and 45-510 must be harmonized, not read as mutually exclusive. ParkWest's reading of Idaho Code section 45-1506(10) ignores, and if adopted would eviscerate, Idaho Code section 45-510, destroying the policy of both the Legislature and the courts that a lien claimant is required to commence proceedings against all persons and entitles who claim a right in the Property. That construction is unreasonable, and should be rejected.

C. Notice Is Irrelevant To The Section 45-510 Analysis, And Therefore Neither The Lis Pendens Nor The Barnson Judgment Have Any Effect On (i) The Priority Date Of ParkWest's Lien Or (ii) Residential's Interest In The Property.

1. The Lis Pendens provides notice only that ParkWest's Lien was extinguished as against First American and its successors in interest.

Under Idaho Code section 45-510, a mechanic's lien is extinguished unless proceedings are timely commenced to foreclose it. Notice of the lien, or notice of commencement of the action to foreclose it, is irrelevant. This Court has, for nearly one hundred years, been true to the

statutory language and unequivocally held that notice of an intent to foreclose a lien is insufficient to prevent the expiration of a mechanic's lien. This fundamental principle of Idaho law is aptly demonstrated in the case of *Willes v. Palmer*, 78 Idaho 104, 298 P.2d 972 (1956). In *Willes*, the plaintiff properly recorded a mechanic's lien to secure an unpaid balance due on a home improvement project. *Id.* at 106–07, 298 P.2d at 973–74. Although the plaintiff timely filed an action to foreclose the mechanic's lien, the plaintiff named only the husband as the owner of the property, and failed to name the wife, who co-owned the residence as community property. *Id.* at 107, 298 P.2d at 973. The district court permitted the plaintiff to amend his complaint by adding the wife as a defendant nearly thirteen months after the lien was filed. *Id.* On appeal to this Court, the wife argued that because she was not made a party to the litigation until after the expiration of the six-month period, proceedings had not been commenced against her within six months after the claim of lien had been filed. *Id.* at 108, 298 P.2d at 974. This Court agreed, holding that the lien was void for all purposes as to any party not made a defendant to the enforcement of the suit within six-months of the filing of the lien, and the fact that the wife had notice of both the lien and the foreclosure action did not excuse the lien claimant's failure to commence proceedings against the wife. *Id.* The majority of the Court rejected Justice Keeton's dissent, wherein Justice Keeton argued that the wife had actual notice of the lien, as the wife "actually directed the improvements made on the property," and thus "[t]here could be no surprise or prejudice and the lien as filed is sufficient to bind the property." *Id.* at 111, 298 P.2d at 976 (J. Keeton, dissenting). As recently recognized, the wife "obviously knew of the proceedings because she was personally present at the trial, joined in the answer filed by her

husband, and elected to proceed with the trial rather than have a continuance to prepare." *Terra-West, Inc. v. Idaho Mut. Trust, LLC*, 150 Idaho 393, 402, 247 P.3d 620, 629 (2010) (Eismann, J., dissenting). Still, the Court unequivocally held that a lien claimant must actually commence proceedings within six months after the lien is filed in order to give the court jurisdiction to foreclose the lien: "The action not having been brought against [the wife] within the six month period, the lien as to her interest in the property was wholly lost." *Willes*, 78 Idaho at 108, 298 P.2d at 974. "The half interest of the husband could not be severed from that of the wife by foreclosure and sale to satisfy the mechanic's lien, and . . . the right to foreclose as to the husband's interest" was also denied. *Id.* at 109, 298 P.2d at 975.

In *Boise Payette Lumber Co. v. Weaver*, 40 Idaho 516, 234 P. 150 (1925), a lumber company, plumbing and heating contractor, and builder were all unpaid after constructing a home. The contractor and builder filed mechanic's liens, but the lumber company instead took a promissory note secured by a mortgage on the home. When the lumber company filed an action to foreclose its mortgage and made the lien claimants defendants, the lien claimants filed answers and cross-claims upon their respective liens, but the contractor did not file a cross-complaint to foreclose his mechanic's lien against the landowner until more than six months after he had filed his claim of lien. Prior to the expiration of that six-month period, he and the landowner had filed a written stipulation that the time for foreclosing his lien could be extended for six months. Notwithstanding the stipulation, this Court held that the contractor had lost his lien: "The time within which an action to enforce a lien can be commenced after the lien has been filed cannot be extended, as against another incumbrancer, by an agreement between the

lienor and the owner to extend the time of payment." *Id.* at 521, 234 P. at 152. Even though the contractor had filed a cross-claim against the mortgagee regarding his lien, he lost his lien because he had not also timely filed a cross-claim against the landowner, who was a party to the litigation and would have known of the cross-claim against the mortgagee. Based upon the stipulation, the landowner also obviously knew that the contractor intended to foreclose his lien. *See Terra-West, Inc.*, 150 Idaho at 402–03, 247 P.3d at 629–30 (Eismann, J., dissenting).

The issue of "notice" has never been relevant to the 45-510 analysis. At most, ParkWest's lis pendens and the Barnson Judgment provided Residential notice that ParkWest had *failed* to commence an action to foreclose its Lien as against First American, that the Lien was expired as to First American, and therefore that Residential could take title to the Property from First American free and clear of the Lien. In short, the allegation that Residential may have had constructive notice of an expired mechanic's lien is simply irrelevant.

Idaho Code section 5-505, Idaho's lis pendens statute, makes clear that a lis pendens provides notice only that there is an action pending between the named parties:

> In an action affecting the title or the right of possession of real property, the plaintiff at the time of filing the complaint . . . may file for record with the recorder of the county . . . a notice of the pendency of the action, containing the names of the parties, the object of the action or defense, and a description of the property in that county affected thereby. From the time of filing such notice for record only shall a purchaser or incumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, ***and only of its pendency against parties designated by their real names***.

(emphasis added). Under the language of the statute, ParkWest's lis pendens gave notice only of the pendency of the lawsuit as against the named parties. ParkWest's lis pendens thus gave

Residential constructive notice only that ParkWest had commenced an action against Barnson and MERS, not First American from whom Residential acquired title to the Property.

The case cited by ParkWest to support this "lis pendens" argument – in fact, the very language quoted by ParkWest – supports a finding that Residential takes title subject only to the rights of the parties to the lawsuit:

> The doctrine of lis pendens refers to the common law principal that when a third party – with actual or constructive notice of a pending action involving real property – acquires an interest in that real property ***from a party to the action, then the third party takes subject to the rights of the parties in the action*** as finally determined by the judgment or decree.

Sartain v. Fidelity Fin. Servs., Inc., 116 Idaho 269, 272, 775 P.2d 161, 164 (Ct. App. 1989) (emphasis added). Thus, Residential can only be said to have taken title subject to the Court's determination of the rights of Barnson and MERS; however, Residential's title does not derive from these parties, but from First American, against whom the Lien is void. Neither *Sartain* nor any other case holds that the filing of a lis pendens is an adequate substitute under Idaho Code section 45-510 for naming as defendants all parties with an interest in the liened property.

A "lis pendens does not purport, by itself, to establish or to change anyone's legal rights. [The filing of a lis pendens] does not mean that any underlying legal rights have been altered." *Jerry J. Joseph C.L.U. Insurance Assoc., Inc. v. Vaught*, 117 Idaho 555, 557, 789 P.2d 1146, 1148 (Ct. App. 1990). Idaho courts have never held that a lis pendens was sufficient to bind purchasers where the lien had expired under Idaho Code section 45-510. In *Palmer v. Bradford*, 86 Idaho 395, 388 P.2d 96 (1963), the Supreme Court took note of the fact that the lien claimant had "caused a lis pendens to be regularly filed." *Id.*, at 388 P.2d at 98. Nevertheless, the Court

held that because "No proceedings of any kind were commenced by appellants to enforce their lien within six months . . . the lien therefore became unenforceable and is not entitled to priority over respondents' mortgage lien" (*Id.*, 399 P.2d at 99-100), notwithstanding the fact that a lis pendens had been recorded.

Under Idaho Code section 45-510, it is the commencement of an action that preserves a lien beyond six-months, not constructive notice of an action commenced against other defendants. As this Court's long history makes clear, notice of a pending action does not satisfy Idaho Code section 45-510 where the person on "notice" is not a defendant in the action.

2. Residential's interest in the Property is senior to the Barnson Judgment Lien.

ParkWest argues that *its interest in the Property obtained by virtue of the Barnson Judgment is senior to the interest obtained by Residential. See* Appellant's Br. at 18–20. This argument can be answered by application of basic principles of real property law: the foreclosure of a mortgage terminates all interests in the foreclosed property that are junior to the mortgage. *See Sun Valley Land & Minerals, Inc. v. Hawkes*, 138 Idaho 543, 546, 66 P.3d 798, 801 (2003). The priority date for a deed of trust is the date the deed of trust is recorded. *See* IDAHO CODE ANN. § 55-811. There is no dispute in this case that the priority date of the Deed of Trust was November 14, 2006, the date it was recorded. The Barnson Judgment was recorded on October 7, 2008, and so pursuant to Idaho Code section 10-1110 ("from the time of . . . recording, and not before, the judgment so recorded becomes a lien upon all real property of the judgment debtor in the county") it was junior to the Deed of Trust. By application of the rule in *Sun Valley Land*, when the Deed of Trust was foreclosed and First American conveyed the Property to Residential

following the Trustee's Sale, the foreclosure and sale terminated all interests in the foreclosed property that were junior to the Deed of Trust, including the Barnson Judgment. By application of Idaho law, Residential took the Property free and clear of the Barnson Judgment lien.

3. The Barnson Judgment Lien does not "relate back" to the date ParkWest commenced work on the Property.

ParkWest next asserts that the priority date of its Barnson Judgment Lien relates back to the date that ParkWest commenced work on the Property. *See* Appellant's Br. at 21–25. This argument is contrary to the plain language of Idaho Code section 10-1110, which states:

> A transcript or abstract of any judgment or decree of any court of this state . . . certified by the clerk having custody thereof, may be recorded with the recorder of any county of this state, who shall immediately record and docket the same as by law provided, and ***from the time of such recording, and not before***, the judgment so recorded becomes a lien upon all real property of the judgment debtor in the county

See IDAHO CODE ANN. § 10-1110 (emphasis added). Judgment liens are creatures of statute, and absent this statute, ParkWest would not have had a judgment lien at all. The plain language of the statute is that a judgment lien is effective only as of the time it is recorded and not before.

Furthermore, the District Court held that each and every one of the cases cited by ParkWest in support of its argument are factually distinguishable, and none of them involved a judgment lien arising out of a mechanic's lien:

> ParkWest has not cited any authority from the State of Idaho in which the "relation back" doctrine has been applied to a factual scenario similar to the record of this case. ParkWest has not demonstrated to this court why it should disregard the specific language of Idaho Code section 10-1110 that specifically provides that the date the judgment recorded pursuant to that section is the effective date for establishing lien priority.

R., Vol. IV, p. 591. Consistent with the plain language of Idaho Code section 10-1110, this Court should similarly find that the Barnson Judgment Lien does not relate back to when ParkWest allegedly started work on the Property, and is junior to the Deed of Trust.

ParkWest cannot revive an otherwise expired lien by obtaining a judgment against Barnson, and then claiming that the judgment relates back to the time that ParkWest first commenced work on the Property. The Barnson Judgment did not fully and finally determine the validity of ParkWest's mechanic's lien. Indeed, the Barnson Judgment does not even purport to determine the validity of ParkWest's Lien. R., FA, pp. 106–10. Instead, the Barnson Judgment indicates that "ParkWest shall have a judgment against Barnson to the extent of her interest in the Property, but not personally . . . ." R., FA, p. 107. In this case, as demonstrated by Part IV(A), *supra*, the Lien is void as applied to Residential. Consequently, ParkWest cannot merely obtain a default judgment against one of the parties to the lien foreclosure action, and thereby revive the otherwise invalid Lien by application of that default judgment. Such a result would be contrary to Idaho law and common sense.

If ParkWest's argument were accepted, property owners would be at liberty to collude with any purported mechanic's lien claimant to strip lenders of their interests in real property. Consider the following hypothetical: a property owner who received a loan secured by real property, but who no longer desires her land to be burdened with an encumbrance, could collude with a purported—even fictitious—mechanic's lien claimant, allow a default judgment to be entered (as Barnson has done with ParkWest here), and then use that judgment to strip the lender of its interest in the formerly-encumbered property. Under the rule advanced by ParkWest, the

default judgment would "relate back" to before the lender's deed of trust, thus foreclosing the lender's interest in the property. Such a technique could be used by anyone, regardless of the merit of the purported mechanic's lien. Indeed, even an abjectly fraudulent claim could strip a lender of its rights. Under ParkWest's argument, the lender would not need to be named in the lawsuit and would not even learn of the suit until after the judgment had been entered and the "lien claimant" had obtained a senior interest in the property.

Perhaps recognizing the disastrous implications of accepting ParkWest's argument, no court—in Idaho or elsewhere—has ever held that a judgment lien premised upon a mechanic's lien relates back to the date the lien claimant commenced work on the property. ParkWest cites the Washington Court of Appeals case of *BNC Mortg., Inc. v. Tax Pros, Inc.*, 46 P.3d 812, 818 (Wash. Ct. App. 2002), for the proposition that "[i]n general, a judgment lien against real estate relates back to the date on which the real estate was attached." In that case, the defendant had recorded a pre-judgment writ of attachment (a critical procedural fact not present in this instant case) against the debtor's property, pursuant to statute, in 1994. Then in 1996, the plaintiff recorded a deed of trust, and in 1999, the defendant obtained a judgment. *Id.* at 817. The issue was "whether the 1999 judgment relate[d] back" to the 1994 attachment. *Id.* at 818. In analyzing the issue, the Washington Court of Appeals compared deeds of trust and judgment liens, citing to the controlling principle here: "A judgment creates a lien against real estate in each county where the judgment is recorded. A deed of trust creates a lien against the property it describes. The lien first in time is the lien first in right." *Id.* at 817. Thus, regardless of the nature of the lien—whether a judgment lien, pre-judgment writ of attachment, or a deed of trust—the first *recorded*

lien takes priority.[2] The resolution of the case was premised upon a pre-judgment writ of attachment, which ParkWest does not have here.

ParkWest next cites to *J.I. Kislak Mortgage Corp. of Delaware v. William Matthews Builder, Inc.*, 287 A.2d 686 (Del. 1972), *Rainbow Trust v. Moulton Construction, Inc.*, 200 B.R. 785 (Bankr. D. Vt. 1996), and *Terra-West, Inc. v. Idaho Mut. Trust, LLC*, 150 Idaho 393, 247 P.3d 620 (2010), for the proposition that a mechanic's lien attaches as of the date work commenced. Residential does not challenge this principal, which is codified in Idaho Code section 45-506. S*ee also Metropolitan Life Ins. Co. v. First Sec. Bank of Idaho*, 94 Idaho 489, 492, 491 P.2d 1261, 1264 (1971). However, Residential rejects, as does Idaho law, ParkWest's argument that a judgment lien attaches as of the date the mechanic's lien attaches. That argument is not only unsupported, but contrary to statute and contrary to the case law cited by ParkWest.

Finally, ParkWest argues that "[b]ecause ParkWest's claim against Barnson was merged into the Barnson Judgment and thereby extinguished, ParkWest's ability to obtain the money it is owed is wholly dependent on its ability to enforce its judgment lien in the Property." Appellant's Br. at 24. ParkWest's problem is not that the Barnson Judgment extinguished its lien, but that Idaho Code section 45-510, occasioned by ParkWest's failure to commence a proceeding against First American, extinguished ParkWest's Lien. Moreover, ParkWest's argument is wrong under the law cited by ParkWest:

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[2] Although the Court ultimately found that the later-recorded judgment lien was prior to the previously recorded deed of trust, the Court's conclusion was based on application of the Washington statute regarding pre-judgment attachment. *BNC Mortgage*, 46 P.3d at 818. The judgment lien related back to the date of the pre-judgment attachment. This instant case does not involve a pre-judgment writ of attachment, and mechanic's liens are not entitled to the treatment afforded to pre-judgment writs of attachments, both of which are creatures of statute.

> A lien securing a debt which becomes merged in a judgment generally is not affected by such merger. If a debt is of such a character that a lien is given by common law or statute, the merger of the judgment does not involve a merger of the lien and the latter may continue until the debt is satisfied. . . . If a creditor has a lien upon property of the debtor and obtains a judgment against the debtor, the creditor does not thereby lose the benefit of the lien. The judgment only changes the form of the action for recovery. The creditor retains the right to enforce a lien or gain possession of property held as collateral for the debt. The reason for this rule is to avoid the obvious injustice of forcing the assignee or lien holder to lose its security preference by pursuing its claim to judgment.

46 AM. JUR. 2D *Judgments* § 462 (2006) (citations and footnotes omitted). Residential is not asserting that ParkWest lost its lien priority by obtaining the Barnson Judgment. Instead, Residential is simply asserting that ParkWest lost its lien priority the same way any lien claimant loses its lien priority: by failing to follow the statutory procedure for perfecting and foreclosing it (Idaho Code section 45-510).

ParkWest's collection problem is self-created in another way: via the Barnson Judgment, ParkWest voluntarily waived its right to obtain a personal judgment against Barnson and bet its chances for recovery on its right to foreclose its Lien—a Lien that was expired as against First American. Neither MERS nor Residential were parties to the Barnson Stipulation.

D. The Law Of The Case Doctrine Does Not Preclude Residential From Litigating Additional Challenges To The Validity Of The Mechanic's Lien.

In the first appeal of this matter, before Residential was a party, MERS filed a motion for summary judgment, contending that that ParkWest's mechanic's lien was void because:

> (a) the claim of lien did not substantially comply with *Idaho Code §45-507*; (b) ParkWest was not registered under the Contractor Act when it entered into the construction contract; and (c) prior to contracting with Barnson ParkWest had failed to provide her with the disclosures required by *Idaho Code §45-525*.

Parkwest I, 149 Idaho at 605, 238 P.3d at 205. The District Court agreed, and entered judgment in favor of MERS. On appeal, this Court reversed the District Court's decision and remanded the case, holding that (i) ParkWest substantially complied with the "just credits and offsets" demand and the verification requirement under Idaho Code section 45-507 and (ii) ParkWest did not lose its lien rights under the Idaho Contractor Registration Act. *Parkwest I*, 149 Idaho 603, 238 P.3d 203; R., Vol. I, pp. 83–92. It was in that context that this Court concluded that ParkWest's Lien was "valid for labor and materials supplied after the contractor registered." *Parkwest I*, 149 Idaho at 604, 238 P.3d at 204. This Court did not rule that ParkWest's Lien was valid for all purposes and immune from any other attack of any kind.

Following remand and Residential's intervention and summary judgment arguments, ParkWest asserted that the "law of the case" doctrine precludes Residential from advancing any additional challenges to the mechanic's lien. The District Court disagreed, holding:

> [N]owhere in that appellate decision does the Idaho Supreme Court indicate that ParkWest's lien is valid and enforceable and not challengeable as to all the other lien requirements found in Idaho Code 45-501 *et seq* nor did the Idaho Supreme Court indicate that on remand the district court would be foreclosed from considering other aspects of the lien's validity not specifically addressed by the Court in its appellate decision.

R., Vol. IV, p. 495. The district court correctly determined that the "law of the case" does not preclude Residential from challenging the validity of ParkWest's mechanic's Lien.

The "law of the case" doctrine provides that:

> when "the Supreme Court, in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to

> throughout its subsequent progress, both in the trial court and upon subsequent appeal." The "law of the case" doctrine also prevents consideration on a subsequent appeal of alleged errors that might have been, but were not, raised in the earlier appeal.

Taylor v. Maile, 146 Idaho 705, 709, 201 P.3d 1282, 1286 (2009) (citations omitted). Consequently, the "law of the case" doctrine prevents relitigation in two contexts—(1) where an issue necessary to resolution of an earlier appeal was fully decided; and (2) where issues should have been, but were not, raised in the earlier appeal.

1. *ParkWest I* did not decide all issues regarding the validity of the Lien.

The only issues before this Court on *ParkWest I* were:

> (1) Did the district court err in holding that ParkWest's claim of lien did not substantially comply with Idaho Code § 45-507?
>
> (2) Did the district court err in holding that ParkWest's claimed lien was unenforceable because the construction contract was void for failure to comply with the Contractor's Act?
>
> (3) Did the district court err in holding that ParkWest did not plead a claim for unjust enrichment?
>
> (4) Is MERS entitled to an award of attorney fees on appeal?

Parkwest I, 149 Idaho at 605, 238 P.3d at 205.

ParkWest's failure to name First American within six months as required by Idaho Code section 45-510 was never addressed in the District Court proceedings prior to *ParkWest I*, or in *ParkWest I*. This Court's statement that ParkWest's Lien is "valid for labor and materials supplied after the contractor registered" had reference only to the narrow issues before the Court.

In *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 9 P.3d 1204 (2000) (*Cogeneration II*), Cogeneration argued that the district court erred when, on summary judgment

following remand from *Cogeneration I*, the district court refused to recognize the Supreme Court's statement in *Cogeneration I* regarding the issue of *force majeure*. *Id.* at 747, P.3d at 1213. Instead, the district court had ruled that the *force majeure* issue had not been before the Supreme Court on *Cogeneration I*, and therefore that the Supreme Court's statement on *force majeure* was dictum and *force majeure* could be litigated by the trial Court. *Id.* In its *Cogeneration II* decision, the Supreme Court agreed with the district court, holding:

> We agree that the issue . . . was not foreclosed by our opinion in *Cogeneration I*. The district court correctly perceived the relevant portion of our opinion in *Cogeneration I* as dictum since the issue . . . was not an issue properly before the Court at that time and was not essential to the ultimate disposition of that case. Therefore, we hold that the district court did not err in its interpretation or application of our ruling in *Cogeneration I*.

Id. at 746, 9 P.3d at 1212. In this case, issues concerning the validity of the mechanic's lien outside the context of the verification and statement of demand requirements of Idaho Code section 45-507(3)(a) and 45-507(4) and the Idaho Contractor Registration Act have never been before this Court. The issues now before the Court were never before this Court previously; therefore, the "law of the case" doctrine does not bar the issues in this appeal.

2. The issues in this Appeal could not have been raised in *ParkWest I*.

Additionally, as noted above, the "law of the case" doctrine prevents relitigation of issues that might have been, but were not, raised in the earlier appeal. *Taylor*, 146 Idaho at 709, 201 P.3d at 1286. In this case, it was procedurally impossible for Residential to argue extraneous lien-validity issues in the earlier appeal. In the first summary judgment motion to the district court, MERS—the previous defendant—argued successfully that (i) ParkWest did not comply

with Idaho Code sections 45-507(3)(a) and 45-507(4) and (ii) ParkWest did not comply with the Idaho Contractor Registration Act. When ParkWest appealed the district court's summary judgment decision to this Court, MERS had no ability to raise additional lien issues, as those issues were never before the District Court on summary judgment. To do so would have violated the firmly established rule that issues not presented to the district court will not be considered on appeal. *See, e.g., ParkWest I*, 149 Idaho at 608, 238 P.3d at 208.

The "law of the case" doctrine is designed to prevent relitigation of "alleged errors" of the district court "that might have been, but were not, raised in the earlier appeal." *Taylor*, 146 Idaho at 709, 201 P.3d at 1286. This doctrine is almost always applied to *appellants,* not respondents. Because MERS was the respondent in the first appeal, it was not in a position to raise "errors," as it was successful before the district court.

In *Hawley v. Green*, 124 Idaho 385, 860 P.2d 1 (Ct. App. 1993) (*Hawley II*), the Plaintiff brought a medical malpractice action against her doctors. The doctors obtained a grant of summary judgment on statute of limitations grounds. *Id.* at 386, 860 P.2d at 2. Plaintiff Hawley appealed, claiming that there was a genuine issue of material fact precluding summary judgment on the statute of limitations grounds. *Id.* at 387, 860 P.2d at 3. The Supreme Court found an issue of fact and remanded the case. *Id.* On remand, the district court granted summary judgment a second time to the doctors on statute of limitations grounds. *Id.* On the second appeal, Hawley raised equitable estoppel as a defense to the statute of limitations claim. *Id.* The Supreme Court found that Hawley, the appellant, should have raised equitable estoppel as a defense to a statute

of limitations claim at the trial court level prior to the first appeal, and therefore, was barred from raising it on the second appeal:

> Hawley has not shown why the equitable estoppel issue was not raised in the district court prior to *Hawley I*, or stated differently, she had not pointed to any new or additional fact or circumstance arising after the remand order which gave rise to the estoppel issue. Because the estoppel argument was clearly available to Hawley prior to *Hawley I*, we will not address the issue.

Id. at 392, 860 P.2d at 8. The case stands for the proposition that the *appellant* may be barred from raising, on a second appeal, issues that the *appellant* should have raised previously. *Accord Taylor*, 146 Idaho 705, 201 P.3d 1282 (2009) (finding that where an issue has already been before the Court on appeal, or where the appellant in the first appeal should have raised the issue, the issue cannot be relitigated).

In response, ParkWest cites the case of *Bouten Construction Co. v. H.F. Magnuson Co.*, 133 Idaho 756, 992 P.2d 751 (1999), for the proposition that the *respondent* in the earlier appeal can be barred from raising new issues not litigated in the first appeal. *See* Appellant's Br. at 28. In *Bouten*, the plaintiff brought a contract action against the defendant, which was fully litigated on the merits. *Bouten*, 133 Idaho at 759, 992 P.2d at 754. The plaintiff was partially successful, but the court found that the defendant had not "waived" a certain argument. *Id.* The plaintiff appealed, and the court of appeals reversed and remanded. *Id.* On remand, without hearing new evidence, the district court awarded the plaintiff additional damages. *Id.* The defendant then appealed, asserting an entirely theory of the case in from of the Supreme Court. *Id.* at 762, 992 P.2d at 757. The Idaho Supreme Court held that:

> Magnuson argues that the contract with Bouten provided that any savings in the subcontractor's bids over the GMP was to be passed on to Magnuson. However, Magnuson did not raise this issue at trial.
>
> Magnuson contends that the issue was raised below because it is tangentially referred to in Bouten's plaintiff's reply memorandum pursuant to order of August 4, 1994. However, this memorandum was filed in response to the order on remand after trial and after the appeal to the Court of Appeals. Thus it was not raised at the trial court level.
>
> The Court of Appeals has ruled that "under the 'law of the case' principle, on a second or subsequent appeal the courts generally will not consider errors which arose prior to the first appeal and which might have been raised as issues in the earlier appeal." *Hawley v. Green*, 124 Idaho 385, 392, 860 P.2d 1, 8 (Ct. App. 1993). Therefore, since the issue was not raised at the trial court level nor to the Court of Appeals on the first appeal, it will not be considered by this Court.

Id. The Supreme Court refused to hear the issue because it was not raised prior to the appeal.

Bouten is distinguishable from the case at bar. In *Bouten*, the Court came to its holding only after the district court had held a full trial on the merits, and the defendant failed to raise the pertinent issue, and after the plaintiff appealed, and the defendant again failed to raise the pertinent issue. That procedural situation does not exist in this instant case: there has been no trial on the merits, and there has been no prior appeal in which Residential had the ability to raise the issues that are currently before this Court.

Next, Residential is a new party to this lawsuit, having intervened after this case was remanded by the Supreme Court in the first appeal. Residential was not a party to the proceedings before this Court prior to the appeal, nor was it a party to the appeal. Residential has the right to raise issues that MERS did not raise previously. As the District Court pointed out:

> the current issues raised by Residential were not, nor likely could have been, raised either before Judge Petrie or during the appeal of his decision because neither Residential nor its predecessor in interest were named parties to this action at the time Judge Petrie decided the issues previously appealed to the Idaho Supreme Court.

R., Vol. IV, p. 496. Residential should not be barred by the law of the case doctrine.

Finally, if this Court were to accept ParkWest's reasoning that MERS should have raised this issue at or prior to *ParkWest I*, it would effectively be adopting the position that a party bringing a motion for summary judgment *must raise every conceivable issue* in fear of application of the "law of the case" doctrine. Under ParkWest's urged rule of procedure, litigants would be required to bring every conceivable issue on summary judgment, regardless of whether discovery had been conducted and regardless of whether there existed a good faith basis at the time for seeking summary judgment on the issue, or risk being precluded from arguing the issue later. As here, a late-added defendant or intervenor would find itself barred from raising defenses that the originally-named defendant did not raise. Gone would be the days of speedy resolution of meritless claims, as would be any hope that litigation or court dockets could be managed efficiently or fairly. Such a result should be rejected by this Court. Residential should not be barred from raising additional issues related to the validity of ParkWest's Lien by application of the "law of the case" doctrine.

E. Residential is Entitled to Attorney's Fees on Appeal.

ParkWest cannot show that the District Court misapplied the law in granting summary judgment in favor of Residential. ParkWest's arguments are "largely incomprehensible, unreasonable, and lacking foundation in law," and an award of attorney's fees to MERS is

justified. *Bowles v. Pro Indiviso, Inc.*, 132 Idaho 371, 377, 973 P.2d 142, 148 (1999). "An award of attorney fees is appropriate if the law is well-settled and the appellants have made no substantial showing that the district court misapplied the law." *Id.* (internal citations omitted). Attorneys' fees should be awarded to Residential pursuant to Idaho Code section 12-121 and Idaho Appellate Rule 41, under the standard articulated in *Bowles.*

IV. CONCLUSION

For the reasons set forth above, Residential respectfully requests that this Court affirm the decision of the District Court and ward Residential its costs and attorney's fees on appeal.

DATED THIS 8th day of December, 2011.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of December, 2011, I caused to be served a true copy of the foregoing RESPONDENT'S BRIEF by the method indicated below, and addressed to each of the following:

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